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August 15, 2016

Complainant

Superintendent

RE: **FINAL REPORT** for In the Matter of \*\*\*, 2016-06, Alleged Violations of the Individuals With Disabilities Education Act (IDEA).

This is the Final Report pertaining to the above-referenced state special education complaint (Complaint) filed pursuant to the Administrative Rules of Montana (ARM) 10.16.3662. \*\*\* (Complainant) filed the Complaint on behalf of her grandson, \*\*\* (Student), a student in \*\*\* (District). Complainant alleges the District violated the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. §1400 et seq., Montana special education laws, Title 20, Ch. 7, Montana Code Annotated (MCA), and corresponding regulation at 34 CFR Part 300 and ARM 10.16.3007 et seq. The District allegedly:

1. Failed to provide Complainant access to Student's special education records;
2. Denied Student a free appropriate public education (FAPE) by changing Student's educational placement by moving him to a more restrictive setting, and increasing Student's Special Education Service minutes during the 2015-2016 school year without Complainant's consent;
3. Failed to follow the proper procedure for conducting Student's 2016 reevaluation and evaluation report meeting;
4. Failed to respond to Complainant's request for an independent educational evaluation;
5. Erred by having Student evaluated by Montana School of the Deaf and Blind (MSDB) prior to adding recommendations from Complainant to the IEP; and
6. Denied Student FAPE because Student's 2015 and 2016 IEPs were not reasonably calculated to provide educational benefit.

#### **A. Procedural History**

1. On June 8, 2016, the Montana Office of Public Instruction (OPI) received a special education complaint signed by the Complainant. The District had not been served with the Complaint. OPI provided the District with a copy of the Complaint. The Complaint was deemed filed on June 16, 2016.
2. On June 21, 2016, the OPI sent a letter to Complainant clarifying the issues that would be addressed during the investigation.
3. July 11, 2016, the OPI's Early Assistance Program (EAP) concluded the matters alleged in the Complaint were not able to be resolved through the EAP and sent a Request for Written

Response to the District. The Complaint proceeded to investigation. The OPI received the District's written response to the Complaint on July 25, 2016.

4. An appointed investigator conducted interviews with: the Complainant, Complainant's advocate, the District's special education director, special education teacher and superintendent.

## **B. Legal Framework**

The OPI is authorized to address alleged violations of the IDEA and Montana special education laws through this special education state complaint process as outlined in 34 CFR §300.151-153 and ARM 10.16.3662, which occurred within one year prior to the date of the complaint.

Pursuant to 34 CFR § 300.151-153 and ARM 10.16.3662, all relevant information is reviewed and an independent determination is made as to whether a violation of federal or state statute, regulation or rule occurred. Any references to facts outside of the one year timeframe are included strictly for background information.

## **C. Findings of Fact**

1. Complainant, Student's grandmother, has standing to file this Complaint pursuant to ARM 10.16.3661.
2. Student was adopted by his maternal grandparents.
3. Student was twelve and had just completed sixth grade at the time the Complaint was filed.
4. Student was determined to be eligible for special education services due to cognitive delay.
5. During Student's fifth (2014-2015) and sixth grade (2015-2016) school years, his placement was in a special education classroom. During fifth grade student participated in some classes with general education peers. This included social studies, science, music and physical education. During sixth grade, Student participated in physical education, lunch and music with his general education peers. It was noted on the April 23, 2015 IEP that special education staff would be providing instruction in social studies and science, instead of through general education. Academic requirements for those classes increased with more individual responsibility required for completion of tasks than in elementary school.
6. Student's reading, written expression and math achievement scores are presently at the prekindergarten-first grade level.
7. The District's standard practice for providing the IEP to parents is at the meeting, if possible, or sending the IEP by first class mail as soon as possible after the IEP meeting. The District could not provide documentation that a copy of Student's April 23, 2015 IEP was provided to Complainant in the spring of 2016.
8. When requests for copies of the IEP are made, it is noted on a District log. There were no record Grandmother verbally or in writing requested a copy of the April 23, 2015 IEP until January when she came into the school to request a copy of the IEP. A copy of Student's 2015 IEP was provided at that time.
9. In October 2015, Complainant requested visual accommodations for Student because of Intermittent Exotropia. Complainant provided the District a copy of the optometrist's report. The District sought additional information from the regional evaluator for MSDB prior to determining if any additional accommodations were necessary.

10. MSDB conducted a functional vision assessment and learning media assessment on January 26, 2016. Complainant was provided with a copy of the report in February of 2016. The results of the assessment were discussed at the April 13, 2016 evaluation report meeting and the April 2016 IEP team meeting. The IEP team added recommendations to the IEP under supplementary aids and services.
11. Student's April 13, 2016 comprehensive evaluation indicated Student was at his ability level, but Student had not demonstrated mastery of the skills across all domains.
12. There were some discrepancies with the time allotted for special education services in the April 23, 2015 IEP while Student was in fifth grade and the services provided the following school year in sixth grade at the junior high school. .
13. Student's final schedule for his sixth grade year at the junior high school was not finalized at the time of the April 23, 2015 IEP meeting.
14. On the 2015 IEP, Student was to receive instruction (per week) of 440 minutes in reading, 220 minutes in math, 220 minutes in written expression and 30 minutes in speech. Because of the different schedules at the junior high, Student received the same total amount of special education minutes, but received 60 additional minutes in math, 40 minutes less in reading and 20 minutes less in written expression. This schedule continued until the April 18, 2016 IEP meeting.
15. After the 2016 re-evaluation, the school psychologist, Complainant, advocate and District special education staff met to discuss the draft evaluation report.
16. It was determined by that group in a pre-evaluation report meeting on April 11, 2016, that the special education teacher and para-educator's scores on the BASC III were not an accurate measure of Student and those scores would be eliminated from the report. The Parent's and Student's self-report scores were included because it was determined those scores were an accurate reflection of Student. Complainant reported she did not want any of the BASC III included in the report, and alleged other changes were made to the report which were not discussed at the meeting.
17. The final amended evaluation report was reviewed at the April 13, 2016 evaluation report meeting and all team members agreed with that report.
18. Complainant did not request an independent educational evaluation (IEE) after the April 13, 2016 re-evaluation. In June of 2016 Complainant had a neuropsychological evaluation completed on Student. Complainant did not request that the District conduct or pay for the neuropsychological evaluation.
19. Complainant stated she will not provide the neuropsychological evaluation report to the school. She indicated, however, that the results from the report support the evaluation completed by the District.

### **Analysis and Conclusions**

**Issue 1:** Did the District fail to provide Complainant access to Student's special education records?

The IDEA provides a number of procedural safeguards for parents. One of these safeguards is the opportunity to examine records and participate in meetings. 34 CFR § 300.501. As a part of the right of parents to participate in meeting, IDEA provides that parents have the right to inspect and review all educational records for their child that pertain to the identification, evaluation, educational

placement, and the provision of FAPE. 34 CFR 300.501 (a). These records include all records that are collected, maintained or used by the District in the implementation of IDEA for the particular child. These records must be provided without unnecessary delay and before any meeting regarding an IEP, or any due process hearing or resolution session, but no later than 45 days after the request has been made. 34 CFR 300.613 (a).

- a. Complainant alleges a copy of Student's 2015 IEP was never provided to her after the April 23, 2015 IEP meeting.

What occurred in the spring of 2015 is outside the one year look back of this Complaint pursuant to 34 CFR § 300.153(c). However, Complainant also alleges she asked the district for a copy of the 2015 IEP several times in the fall of 2015. The District does not have documentation that the 2015 IEP was given to Complainant in the spring of 2015 after the IEP meeting. There is also no documentation that Complainant requested verbally or in writing a copy of the 2015 IEP in the fall of 2015. The District's practice is to document all requests for copies of IEPs in the District's log. Complainant did receive a copy of the 2015 IEP in January 2016 when she came into the school and made a request for the document. A copy was immediately provided to her. **The District did not violate 34 CFR 300.501(a) or 34 CFR 300.613(a) with regard to Complainant's right to access Student's 2015 IEP.**

- b. Complainant alleges she was not given access to all of Student's special education records as requested on March 2, 2016.

Complaint alleges she verbally requested access to all of Student's special education records from the principal on March 2, 2016. According to the Complaint, Complainant received copies of Student's IEPs and 2009 evaluation at that time. Complainant alleges she did not receive access to all of Student's special education records at that time, but it is not clear which special education records for Student, Complainant alleges she did not receive.

The standard practice for the District is for a request for records to go through the special services office. The requestor is required to fill out a written request and their identification is checked. The secretary keeps a log of all requests. The District has no record of a request for records by Complainant. **The District did not violate 34 CFR 300.501(a) or 34 CFR § 300.613(a) and did not deny Complainant access to Student's records.**

**Issue 2:** Did the District change Student's educational placement by moving him to a more restrictive setting, and increase Student's Special Education Service minutes during the 2015-2016 school year without Complainant's consent, and therefore deny Student a free appropriate public education (FAPE)?

The IEP, as developed by the IEP team, outlines the programming and services provided to ensure a Student receives FAPE. 34 CFR § 300.320(a). Parents of a child with a disability must have the opportunity to participate in IEP team meetings that make educational decisions regarding placement and services for their child. 34 CFR § 300.327. The IEP must consider the following when developing an IEP:

1. The strengths of the child;

2. The concerns of the parents for enhancing the education of their child;
3. The results of the initial or most recent evaluation of the child; and
4. The academic, developmental, and functional needs of the child.

34 CFR § 300.324 (a)(1).

Student's educational placement in both his fifth and sixth grade years was similar. Student participated with his general education peers in several classes. The schedule and programming for students in junior high is different than elementary students. Classes at the elementary school referred to as "specials" included social studies, science, music and physical education. These classes were not taught in depth and were not taught on a daily basis, whereas those same classes at the junior high are separate, stand alone classes. Academic requirements for those classes include a higher reading level and more individual responsibility for completion of tasks than in elementary school where the classes are often discussion based. Therefore, students who participated with general education students in elementary school may need more services through special education services to receive FAPE when in junior high school.

A student's placement is determined by the IEP team after the programming and services are determined by the IEP team. 34 CFR § 300.116(b)(2); 34 CFR § 300.327. Moreover, the IEP requires that the IEP team consider the least restrictive environment (LRE) available to provide FAPE. LRE regulations require that students be educated in regular classroom settings to the maximum extent appropriate. 34 CFR § 300.114 (a); and OSEP Memorandum 95-9, 21 IDELR 1152 (OSEP 1994). The IDEA requires each public agency to ensure that:

1. To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and
2. Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes, with the use of supplementary aids and services, cannot be achieved satisfactorily.

34 CFR § 300.114 (a).

Although the goal of the IEP team is to have the student educated in regular education settings, the setting may be more restrictive if that placement allows the child to receive "meaningful educational benefit." P. v. Newington Board of Education, 51 IDELR 2 (2d Cir. 2008). See also Hartmann v. Loudoun County Board of Education, 26 IDELR 167 (4th Cir. 1997), cert. denied, 111 LRP 18076, 522 U.S. 1046 (1998). The IEP indicated Student would receive social studies and science in the special education classroom at the junior high school because of his particular needs. This was determined by the IEP team at the 2015 IEP meeting. Complainant participated in that discussion at the IEP team meeting and consented to the IEP.

The District must implement the IEP as it is written with all required components. 34 CFR § 300.323 (c). "When a school district does not perform exactly as called for by the IEP, the district does not violate the IDEA unless it is shown to have materially failed to implement the child's IEP. A material failure occurs when there is more than a minor discrepancy between the services provided to

a disabled child and those required by the IEP.” Van Duyn v. Baker School District, 502 F.3d 811,815 (9<sup>th</sup> Cir. 2007).

The IEP must be in effect at the beginning of the school year. 34 CFR § 300.320; 34 CFR § 300.323(a). At the time of the drafting and implementation of the 2015 IEP, Student was in fifth grade and the final schedule for sixth grade had not been determined. This IEP was in effect until April of 2016 when a new IEP was signed by Complainant. The services Student received were as outlined on the IEP. He was taught by a special education teacher and a special education para educator who was supervised by the special education teacher. The total number of minutes of special education services provided per week in fifth grade and sixth grade was the same, but sixth grade services offered 40 minutes less in reading and 20 minutes less in written expression, with 60 minutes more in math. Complainant was made aware of the changes, but the changes were not documented on an IEP addendum. This schedule was followed until the new IEP was written and consented to on April 18, 2016, at which time the correct minutes were designated on the Student’s 2016 IEP for the remainder of the 2015-2016 school year.

The District is advised to check its policies and procedures regarding accuracy of IEP minutes when a student transitions from elementary to junior high. However, this student’s overall program was the same in fifth and sixth grades, and the District implemented Student’s 2015 IEP. Although there were minor deviations of minutes of instruction due to class scheduling differences at the junior high school, Student received all of his special education service minutes. **The District did not deny Student a FAPE by changing Student’s placement or failing to implement the IEP.**

**Issue 3:** Did the District follow the proper procedure for conducting Student’s 2016 reevaluation and evaluation report meeting?

Evaluation procedures are set out in 34 CFR §§ 300.303-306. The District obtained Complainant’s consent to conduct a reevaluation, including a psychological evaluation. 34 CFR § 300.300(c). The reevaluation was completed and Complainant met with the psychologist, special education staff and advocate to discuss the draft psychological report. At that meeting, certain portions of the BASC III, completed by the special education teacher and para educator, were deleted from the report because the team determined that those scores were not an accurate depiction of Student. Complainant reported that she wanted all of the BASC III results excluded but the parent and student results were included in the final report. The final report was approved by Complainant, at the April 13, 2016 evaluation report meeting, as indicated by her signature and the signatures of the rest of the IEP team members on the evaluation report.

Although the process of holding a pre-meeting to discuss the psychological testing is unusual, there is nothing in the IDEA that prohibits it. The evaluation report meeting was held and the Complainant signed the report indicating her approval. **The District is not in violation of the reevaluation procedures set out in 34 CFR §§ 300.303-306.**

**Issue 4:** Did the District fail to respond to Complainant’s request for an Independent Educational Evaluation (IEE)?

Parents have the right to request an IEE at public expense if they disagree with an evaluation obtained by the district. 34 CFR § 300.502(b)(1) through 34 CFR § 300.502(b)(2). There is no evidence that Complainant ever requested an IEE from the District and Complainant verified through

the investigation process that she does not allege that she requested an IEE. Complainant indicated Student was going to have a neuropsychological evaluation completed, but she did not request that the District schedule or pay for the evaluation. Complainant also indicated Student had academic testing through a private tutoring company in April of 2016.

Parents have the right to pay for any IEE they choose. 34 CFR § 300.502(a)(1); 34 CFR § 300.502(c). In Complainant's reply to the District's Response dated August 2, 2016, she stated the results of both evaluations supported the District's evaluations. She also stated, specifically in regard to the neurological report, "[t]his report was intended as medical and parental information to learn what [S]tudent's neurological abilities are and when in the correct educational setting what educational abilities should be expected. This evaluation will be shared with [S]tudent's future teachers individually; however, it will not be submitted to [S]tudent's records. Neurological abilities need to be made clear to the individual educators with discussion from parent who is the only person who discussed testing with evaluator. A person untrained in neurology reading the evaluation without discussion with the evaluator or parent could possibly misconstrue the information in the evaluation, creating very large problems in the education planning for [S]tudent, therefore the Neuro-Psychological Evaluation will not become a part of [S]tudent's school records." Additionally Complainant reports, "The evaluator goes on to state he is impressed with how well [S]tudent is able to learn and gives recommendations of academic procedures, and educational placement."

Pursuant to 34 CFR § 300.502(c) if a parent shares an evaluation obtained at private expense, that information must be considered, if it meets agency criteria, in any decision made with respect to the provision of FAPE. If the District does not have the neuropsychological report, information in that report cannot be considered and used in development of the IEP or provision of FAPE for the Student. **The District did not violate 34 CFR § 300.502.**

**Issue 5:** Did the District err by having Student evaluated by MSDB due to Student's diagnosis of Intermittent Exotropia prior to adding recommendations from Complainant to the IEP?

Evaluations serve two purposes: the identification of students who need special education and related services and determining what specialized instruction the student needs. 71 Fed. Reg. 46,548 (2006). A reevaluation is required if the student's educational needs suggest additional information to develop an appropriate IEP. 34 CFR § 300.303 (a). Complainant provided the District with information from the Student's optometrist that he had Intermittent Exotropia (when on eye occasionally turns outward). As a result, the District requested a screening from MSDB to see if additional accommodations, modifications or services were required because of Student's diagnosis. Complainant did not indicate when she reported the diagnosis that additional services may be necessary. The report from MSDB did make some recommendations which were discussed at the April 13, 2016 evaluation report meeting, and by the IEP team at Student's 2016 IEP meeting. The IEP team added the recommended services to the IEP under supplementary aids and services. Complainant may not have seen the MSDB report immediately after it was received by the District, but she did receive a copy and had an opportunity to discuss the report at the IEP meeting. Complainant participated in the development of the IEP including accommodations, modifications and services. **The District properly followed the procedure to obtain an evaluation to see if additional accommodations, modifications or services were necessary due to Student's diagnosis of Intermittent Exotropia, and no violation is found.**

**Issue 6:** Did the District deny Student a free appropriate public education (FAPE) because Student's 2015 and 2016 IEPs were not reasonably calculated to provide educational benefit?

Students who are eligible for special education services are entitled to a FAPE. 34 CFR § 300.101. Districts are obligated to provide a FAPE to students within their District who are eligible for special education services. 34 CFR § 300.17. The type of services to be provided are determined by the IEP team. 34 CFR § 300.320. The well-recognized standard for whether a child has received FAPE is whether the IEP is reasonably calculated to provide some educational benefit. Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 US 176, 197 553 IDELR 656 (1982). The Rowley standard does not require an education that maximizes a student's potential, but only requires a "floor of opportunity." Id. The issue on this record is whether Student was denied the opportunity to receive educational benefit for failure to receive appropriate instruction, supports and services to make progress.

The special education and related services on the IEP are individually determined based on the unique needs of the child. Rowley, 458 US 176, 197, 553 IDELR 656 (U.S. 1982). The IEP team is responsible for developing and implementing an IEP that is designed to provide FAPE. FAPE includes special education and related services that:

- a. Are provided at public expense, under public supervision and direction, and without charge;
- b. Meet the standards of the SEA, including the requirements of this part;
- c. Include an appropriate preschool, elementary school, or secondary school education in the State involved; and
- d. Are provided in conformity with an individualized education program (IEP) that meets the requirements of 34 CFR § 300.320 through 34 CFR § 300.324.

34 CFR § 300.17.

Special education means "specially designed instruction, provided at no cost to the parents, that is intended to meet the unique needs of a child with a disability, including: 1) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and 2) instruction in physical education." 34 CFR § 300.39 (a)(1). Each IEP must include a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided to enable the child:

1. To advance appropriately toward attaining the annual goals;
2. To be involved in and make progress in the general education curriculum in accordance with this section, and to participate in extracurricular and other nonacademic activities; and
3. To be educated and participate with other children with disabilities and nondisabled children in the activities described in this section.

34 CFR § 300.320(a)(4).



Complainant focused on the progress Student made in fifth grade in comparison to the lack of progress she observed in sixth grade. Complainant reported Student made one year's growth in fifth grade, and in sixth grade was still working on the same skills mastered in fifth grade or on prekindergarten skills previously mastered. Student has made progress this year, although not as much as last year. Lack of consistent academic progress does not necessarily mean Student has not made progress. Student is functioning at the first grade in math and reading. The homework Complainant alleges was too basic for Student's skill level included basic skills for which Student had not yet demonstrated mastery across all domains. The District alleged that practice is necessary to ensure that the Student mastered each skill.

A review of Student's progress reports show skills Student mastered at one time may not have been fully ingrained, and may need to be retaught. The question is whether the IEP was reasonably calculated to provide some educational benefit. It appears from a review of the IEP and services provided that Student's IEPs were designed to provide educational benefit for this particular Student. **Based on these facts and conclusions, Student was not denied FAPE.**

#### **D. Disposition**

For the above reasons no violations were found against the District.

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Ann Gilkey  
Chief Legal Counsel

c: Mandi Gibbs, Dispute Resolution/EAP Director  
Frank Podobnik, State Special Education Director